

NOV 24 1995

IN THE UNITED STATES BANKRUPTCY COURT J. BAKON GROSHON
FOR THE WESTERN DISTRICT OF NORTH CAROLINA

BY VBB

Deputy Clerk

IN RE:

VIVIAN J. HARDEE

DEBTOR.

Case No. 95-31282
Chapter 7

JUDGEMENT ENTERED ON NOV 24 1995

**ORDER SUSTAINING TRUSTEE'S OBJECTION TO EXEMPTION, AND FINDING
PROPERTY NOT "PROPERTY OF THE ESTATE" UNDER SECTION 541(c)(2)**

This Matter is before the court on the Chapter 7 Trustee's Objection to Debtor's Exemption Election filed October 5, 1995. After an examination of the record and review of the appropriate case law and statutes, the court has concluded that the Trustee's objection should be sustained. However, the court further finds that the property in issue is not property of the estate under §541(c)(2) of the Bankruptcy Code, and thus holds that the debtor's claimed exemption of the asset is inappropriate. The court makes the following Findings of Fact and Conclusions of Law:

Findings of Fact

1. The debtor filed a petition under Chapter 7 of the Bankruptcy Code on August 31, 1995.

2. In the Petition and Schedules, specifically schedules B, C, and I, the debtor indicated that she had an interest in property denoted as "Teachers Ins. and Annuities," that the asset was exempt, and that its value was zero. The asset was listed as exempt based on it being "ERISA-qualified".

3. On October 5, 1995, the trustee objected to the debtor's exemption in the property, specifically that the property was exempted as being ERISA-qualified.

4. The property is an annuity fund held by the debtor as a beneficiary of a retirement policy. The fund manager is the Teachers Insurance and Annuity Association of America-College Retirement Equities Fund ("TIAA-CREF"). The TIAA-CREF fund was originally a retirement fund for James Clyde Swink, the debtor's cousin. The debtor inherited the fund as beneficiary upon Mr. Swink's death.

5. The fund allowed the participant or beneficiary an option of accepting either a lump sum payout or an instalment payout. On September 19, 1991, upon receipt of notice of her interest in the fund at Mr. Swink's death, the debtor chose to continue the installments until the final payment date. Under the Plan, the debtor receives approximately \$180.00 per month.

6. The TIAA-CREF Plan contains a non-alienation clause. Specifically, the Plan states in Article 7.1:

Non-Alienation of Retirement Rights or Benefits. To the fullest extent permitted by law, no benefit under the Plan may at any time be subject in any manner to alienation, encumbrance, the claims of creditors or legal process. No person will have the power in any manner to transfer, assign, alienate, or in any way encumber his or her benefits under the Plan, or any part thereof, and any attempt to do so will be void and of no effect.

The Plan further restricts any use of the funds held in the Plan. Specifically, the Plan states in Article 4.4: "TIAA and CREF Retirement Annuities do not provide for loans or cash surrender and cannot be transferred or assigned."

Conclusions of Law:

7. After review of the documents, the court finds that the TIAA-CREF fund is an ERISA-qualified Plan.¹

8. The first issue in this matter is whether the TIAA-CREF fund is property of the estate--not whether the exemption is proper. Because the court finds that the asset is not included as property of the estate, the objection to exemption, though sustained, is irrelevant.

9. Section 541 of the Bankruptcy Code includes as property of the estate "all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. § 541(a)(1). However, §541(c)(2) contains an exception which states: "A restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law is enforceable in a case under this title." In discussing this section, the Supreme Court has stated that "[t]he natural reading of the provision entitles a debtor to exclude from property of the estate any interest in a plan or trust that contains a transfer restriction enforceable under any relevant nonbankruptcy law." Patterson v. Shumate, 504 U.S. 753, 758 (1992). In Shumate, the Supreme Court rejected the proposition that the Bankruptcy Code excluded only those funds that would qualify as spendthrift trusts under state law, and expressly held

¹ The particular TIAA-CREF annuity in this Matter has been held to be ERISA-qualified and therefore not property of the estate by at least one other court. In Re Maureen Bennett, 185 B.R. 4 (1995).

that trusts under federal law are protected as well. Therefore, the Court determined that an anti-alienation clause contained in a debtor's ERISA-qualified plan constituted a restriction enforceable under nonbankruptcy law, and the interest may be excluded from his estate under the Bankruptcy Code. Id. at see also, United States v. Smith, 47 F.3d 681 (4th Cir. 1995).

10. The TIAA-CREF annuity meets the requirements of §541-(c)(2) and is therefore not property of the estate. The fund meets the definition of ERISA-qualified and contains sufficient non alienability restrictions. Therefore, the beneficiary's creditors, including the Trustee, cannot reach the corpus of the fund.

11. The second issue in this matter is whether the Trustee, even if he cannot reach the corpus, may reach the monthly payout received from the annuity. Because the court finds that the stream of payments is future income, under Chapter 7 of the Bankruptcy Code this stream of payments is not property of the estate.

12. One of the main concepts of Chapter 7 bankruptcy is that it is a liquidation bankruptcy. Under Chapter 7 of the Bankruptcy Code, §541 includes as property of the estate "all legal or equitable interests of the debtor in property as of the commencement of the case." In contrast to Chapter 13 bankruptcy, Chapter 7 bankruptcy does not include future income as property of the estate but only that income which was earned prior to the filing of bankruptcy.

13. In the present case, if the debtor had filed under Chapter 13, the monthly payments received from the TIAA-CREF Plan would be part of her future income. Under \$1325, the income would flow through to the estate through her Chapter 13 plan. However, since the debtor in this case has filed a Chapter 7 bankruptcy, this future income is not part of the estate. Although there is a theoretical present value to the stream of payments that the debtor will receive under the annuity, this "asset" is not reachable by the Trustee. To allow the Trustee to receive the present value of that stream of future payments through auction or otherwise, would allow the Trustee to achieve through auction that which he has been restricted from doing under §541 of the Code. Therefore, the court concludes that the Trustee may not reach the monthly payouts from the fund.

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:

1. The Trustee's Objection to Debtor's Exemption Election is **SUSTAINED**.

2. The TIAA-CREF annuity fund is not property of the estate.

3. The Trustee may not reach either the corpus or the future monthly payouts under the TIAA-CREF annuity fund.

This the 22nd day of November, 1995.



George R. Hodges
United States Bankruptcy Court